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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AAA Customer Services, LLC

Serial No. 75/748,353

Faye L. Tomlinson of Christensen O'Connor Johnson Kindness PLLC for AAA Customer Services, LLC.

Tracy Cross, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Simms, Bucher and Rogers, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

AAA Customer Services, LLC filed a trademark application to register on the Principal Register the proposed mark EBA for "real estate agencies" in International Class 36.¹ Following a final refusal to register on the ground that the proposed mark is merely descriptive in connection with the recited services,

¹ Application Serial No. 75/748,353, filed July 12, 1999, based on use of the mark in commerce, alleging first use and use in commerce as of June 20, 1999.

applicant amended its application to seek registration on the Supplemental Register.

The Trademark Examining Attorney issued a refusal to register, under Section 23 of the Trademark Act, 15 U.S.C. 1091, on the ground that applicant's proposed mark is incapable of identifying and distinguishing its services, i.e., that EBA is a generic name for the recited services.

Applicant has appealed. Both applicant and the Trademark Examining Attorney have filed briefs, but applicant did not request an oral hearing. We affirm the refusal to register.

With respect to genericness, the Office has the burden of proving genericness by "clear evidence" thereof. See In re Merrill, Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987); and In re Gould Paper Corp., 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987). The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be registered to refer to the category or class of goods or services in question. See In re Leatherman Tool Group Inc., 32 USPQ2d 1443, 1449 (TTAB 1994); and In re Women's Publishing Co. Inc., 23 USPQ2d 1876, 1877 (TTAB 1992). Our principal reviewing court has recently reaffirmed, in In re American Fertility Society,

188 F.3d 1341, 51 USPQ2d 1832, 1836 (Fed. Cir. 1999), the two-step inquiry set out in Marvin Ginn to determine whether a mark is generic: First, what is the category or class of goods at issue? Second, is the term sought to be registered understood by the relevant public primarily to refer to that category or class of goods? H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc., 782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986).

The Trademark Examining Attorney contends that the category or class of services involved herein is real estate agencies providing exclusive buyer's agents. (Trademark Examining Attorney's appeal brief, p. 3).

The Examining Attorney contends, further, that the initialism "EBA" is increasingly used to identify a real estate agent who works exclusively for the homebuyer rather than the seller, and that the designation EBA is the generic name for a category or genus of services which fit perfectly with applicant's real estate agency services as recited and promoted.

In support of her position, the Trademark Examining Attorney submitted lists of initialisms from several websites, including the following:

EBA - Exclusive Buyer's Agent

<< <http://www.acronymfinder.com/af-query.asp?String=exact&Acronym=eba> >>

Additionally, the Trademark Examining Attorney submitted a number of excerpts from articles in the LEXIS/NEXIS database demonstrating use of the terms:

The Exclusive Buyer Agent (EBA) works for an office that does not take listings of any kind and represents only buyers. "Here's How To Pick A Buyer's Real Estate Agent," by Dana Simon, The Tulsa World, May 17, 1997.

Q: There aren't many exclusive buyer's brokers, are there? ...

A: No, there aren't many - we call them EBAs - exclusive buyer's agents... "A maverick, and mighty proud of it," Broward Daily Business Review, January 31, 1997.

Exclusive buyer agents represent the home buyer in transactions... 'An EBA's job is to get the buyer the best price on the best terms, and provide the true facts as to value, market, neighborhood conditions and obvious physical defects,' Early said. "JUST LISTED: A seller's market," Milwaukee Journal Sentinel, January 11, 1998.

Moreover, based upon Internet searches conducted in August 2000 and again in September 2001, the Trademark Examining Attorney has submitted for the record numerous third-party uses of the term EBA. These screen prints are drawn primarily from the websites of real estate agents working exclusively for homebuyers. The following are representative examples of excerpts taken from these sites:

The Acronyms NAEBA (National Association of Exclusive Buyer Agents) and EBA (Exclusive Buyer Agents) are quickly becoming staples in the real estate community, and recognizable by astute buyers everywhere. <<http://www.realestate.com>>, accessed on August 6, 2000.

The Exclusive Buyer Agent (EBA) works for an office that does not take listings of any kind and represents only buyers.

<<http://www.netside.com>>, accessed on August 6, 2000.

A section of our web site explains this revolutionary concept of EBAs and why it's in your best interest to have an Exclusive Buyer's Agent in today's real estate transactions.

< <http://buyersinternational.com/form.htm>>, accessed on August 6, 2000.

The discussion below explains some of the ideas and history of the Exclusive Buyer's Agent movement in real estate.

- **EBAs: Consumer Protection ...**

... the national and state associations of Realtors have worked diligently to muddy the waters for consumers, but even the Oklahoma Supreme Court affirms that EBAs save buyers money!

<<http://buyersinternational.com/exclusivebuyersagents.html>>, accessed on August 6, 2000.

NEED AN EBA?

Need an Exclusive Buyer's Agent outside of Austin? Enter you (sic) information and we will have an agent contact you within 24 hours.

<<http://birchman.com/eba.htm>>, accessed on August 6, 2000.

Exclusive Buyer Agents (EBA) only work in companies that never represent sellers, and are focused at (sic) finding their buyer-clients the best right home, at the best possible price.

<<http://www.buyerinfo.com>> accessed on September 28, 2001.

**American Directory of Exclusive Buyer Agents
and Exclusive Buyer Brokers**

When you start thinking "buy home" and start looking for new homes or residential real estate listings, check out a relatively new breed of homebuyer advocate called an Exclusive Buyer Agent

(EBA), also known as an Exclusive Buyer Broker. EBAs never list real estate for sale on mls because they are in the business of providing dedicated loyalty and confidentiality to people like you who want to buy a home. It makes no difference whether you are experienced or a first time home buyer, EBAs will tell you where the best real estate sales can be found, and they will help you buy a home at the best possible price. Pick a state and choose your city. Enjoy free hot tips, numerous home buying articles, and extensive local information about schools, recreation, loans, the local market, how to get good deals, the best neighborhoods, as well as exclusive buyer agency. Contact an EBA in the city of your choice to discuss why you should have someone representing you for a change. Learn why purchase negotiations are done behind closed doors. Find out what happens if a property has hidden undisclosed problems. For one of the largest investments of your life, why wouldn't you want your own buyer broker on your side? From California on the west coast to Massachusetts on the east coast to Florida in the south and most other states, you will find a friendly EBA ready to be of service.

<<http://www.realestateexclusivebuyeragents.com>
accessed on September 28, 2001.

**Only one type of real estate agent always
negotiates price & terms in favor of the Buyer.**

EXCLUSIVE BUYER AGENT (EBA)

EBAs don't sell real estate ... we help people buy homes. EBAs never take home listings, never have Open Houses, and never represent sellers in the sale of their homes. Buyers get FULL representation, with NO conflict of interest, and your finances kept CONFIDENTIAL ... ONLY from a true EBA.

<<http://www.abuyerbroker.com/>>
accessed on September 28, 2001.

... EBAs can do more for buyers than any other kind of agent ... EBAs give their clients a competitive edge ordinary agents typically can't match ... EBAs "live" their ethical commitment. That is what separates them. EBAs make the career choice to care about their clients' rights, and won't

subject their clients to the possibility of "Dual Agency" nor "Designated Agency," nor "Transactional Agency."

<<http://www.eba.com>>, accessed on September 28, 2001.

Real Estate Designations:

EBA - Exclusive Buyers Agent
<<http://www.har.com/education/designations.htm>>
accessed on September 28, 2001.

'What we are going to concentrate on is doing fewer things and doing them better and getting away from telling people how to run their business,' says Early. 'A national organization should do a better job of presenting the concept of what an EBA is.
<http://realtytimes.com/rtnews/rta/pages/20010727_n_aeba.htm>, accessed on September 28, 2001.

In spite of this substantial evidence, applicant argues that the Trademark Examining Attorney has not sustained her burden of proof. Applicant contends that "[a]pplicant's services cover a much broader range of services including the management, advertisement, acquisition, and sale of real property," further conceding that while the Trademark Examining Attorney's evidence "may support a finding that the term EBA is descriptive of some of applicant's services, the definitions do not support a genericness determination." (applicant's brief, p. 5).

The record shows that the "exclusive buyer agent" (or "exclusive buyer's agent") is a relatively new concept in the real estate business - emerging forcefully in the mid-1990's. Given the newness of this practice in the

industry, the term "exclusive buyer agent" is a relatively new term. In light of its newness, it is not surprising that the three-word expression is often defined the first time it appears within a webpage. Nonetheless, it is clear from the record that "exclusive buyer agent" is now a generic designation for a fairly well established bundle of services being offered by some agents in the real estate industry. Stated differently, this three-word term is incapable of becoming a source indicator for real estate agency services.

Turning then to consider the EBA initialism, we note from the record that the real estate industry is awash in three letter initialisms presented in all capital letters (e.g., MLS, CMO, FHA, ARM, APR, CRV, CMA, GPM, etc.). The first time it appears in a newspaper article or webpage, the EBA initialism frequently follows "exclusive buyer agent." It appears in a sentence as an appositive, or is included in parenthesis and/or quotations marks. Some excerpts include explicit notations that EBA is shorthand for "exclusive buyer agent." ["... we call them EBAs - exclusive buyer's agents..." Broward Daily Business Review, *supra*]. As an abbreviated designation, the EBA initialism is even newer in the field of real estate than is the concept and terminology of "exclusive buyer agent."

However, the online abbreviation, acronym and initialism entries, with adequate corroboration from the NEXIS and Internet entries, demonstrate to our satisfaction that within the real estate industry, the term EBA is now "so generally understood as representing descriptive words as to be accepted as substantially synonymous"² with the term "exclusive buyer agent." Hence, it is reasonable to conclude that a prospective real estate buyer is likely to understand the term, EBA, as naming the identified services.

As noted above, these designations ("exclusive buyer agent" and EBA) have emerged rather rapidly. The fact that this form of agency is just coming into its own is sufficient basis for the explanations often contained in these excerpts - not as applicant argues, because "members of the relevant public would not immediately understand such use of the term." (applicant's brief, p. 6).

Applicant also points out dozens of other terms that appear in the Trademark Examining Attorney's Nexis/Lexis and Internet excerpts to describe real estate services focused on buyers (applicant's brief, pp. 6 - 7). But of

² Modern Optics, Inc., v. Univis Lens Co., 234 F.2d 504, 110 USPQ 293 (CCPA 1956)

course, there may be more than one "name" for a category of services, as is the case herein.

As noted by Professor McCarthy:

There is usually no one, single and exclusive generic name for a product. Any product may have many generic designations. Any one of those is incapable of trademark significance:

All of the generic names for a product belong in the public domain

In one case the proponent of trademark status for the word "Mart" argued that the word is quaint and not generally used. But the court replied that the test is not whether a term is more frequently used colloquially than its synonyms (such as "store" or "market"), but whether it still retains its generic meaning. "Mart" was held to have no other meaning among the consuming public than as a synonym for "store" or "market" and hence was generic. [Footnote omitted] Similarly another court said that the fact that there are other generic names than "Super Glue," such as "Instant Glue" or "Ten Second Glue," does not preclude generic status: "[T]he existence of synonyms for a term does not mean the term is not generic. There may be more than one term which the consuming public understands as designating a category of goods." [footnote omitted]. Thus, while prerecorded audio tape cassettes of books may be generically called "audio books," "talking books," "book cassettes," "cassette books," or "taped books," the designation "recorded books" was held to be a generic name by the Trademark Board, noting that a product can have more than one generic name. [footnote omitted]"

In another example, the Fourth Circuit found that "ale house" was a generic name and one of several generic names for places that serve beer, with or without food. "[Plaintiff] has no protectable interest in the words 'ale house.' They are generic words for a facility that serves beer and ale, with or without food, just as are other similar terms such as 'bar,' 'lounge,' 'pub,' 'saloon,' or 'tavern.' All serve alcohol alone or both food and alcohol." [footnote omitted]

While the Lanham Act uses the singular article "the," referring to "the generic name," the author does not believe that this is the result of any considered judgment by Congress and should not be read as changing the rule of the case law that there can be more than one generic name of a thing.[footnote omitted]

2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §12:9 (4th ed. July 2002).

Applicant argues at length in its brief that acronyms or initialisms for commonly understood terms have been registered on the Principal Register. However, each case must be determined on its own merits. See In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ["Even if some prior registrations had some characteristics similar to [applicant's] application, the PTO's allowance of such prior registrations does not bind the Board or this court"]; In re Broyhill Furniture Industries Inc., 60 USPQ2d 1511, 1514 (TTAB 2001); and In re Pennzoil Products Co., 20 USQP2d 1753, 1758 (TTAB 1991).

Moreover, the records of these registered initialism marks are not before us. For example, applicant argues that the registered mark EBA means "Excess Breath Alcohol" when applied to breath alcohol measuring devices,³ and "Everything but Anchovies" when applied to pizza.⁴ However, these alleged meanings are not drawn from the face of these registrations (which themselves are not of record), and we have no reason to believe that these two initialisms are

³ Reg. No. 1,723,342 issued to Alcohol Countermeasure Systems Corp. on October 13, 1992.

⁴ Reg. No. 2,130,658 issued to Felicci's Mama Mia, Inc. on January 20, 1998.

used interchangeably with the full expressions in their respective fields.

Finally, how the United States Patent and Trademark Office has treated other EBA initialisms in such disparate areas as breath alcohol measuring devices and pizza toppings is totally irrelevant to the issue of what the EBA initialism represents within the field of real estate. Hence, we find applicant's arguments on this point to be unpersuasive.

In conclusion, we find that the initialism dictionaries, the LEXIS/NEXIS evidence as well as the excerpts of Internet webpages support a finding that purchasers and prospective purchasers understand the term EBA as referring to a specific category of real estate agency services. Hence, we find that the initialism EBA is itself generic for the category of, as the Trademark Examining Attorney states, "real estate services provid[ing] exclusive buyers agents," and is therefore incapable of registration on the Supplemental Register for "real estate agencies" because such a recital would include agencies providing exclusive buyer's agents.

Decision: The refusal under Section 23 of the Trademark Act is affirmed.